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January 23, 2004

Janice Rawls, Chief Deputy Clerk
Re: Rule 13 Comments
100 Supreme Court Building
401 Seventh Ave. N.
Nashville, TN 37219-1407

Re: Rule 13 Comments

Dear Ms. Rawls,

I am writing to make general comments on Rule 13 from the viewpoint of counsel that is often appointed and otherwise fully employed. When an attorney takes an appointed case he or she works at a greatly reduced rate subject to unrealistic maximum fee caps. The initial cap is generally so low that no attorney could reasonably represent a client properly for less. Therefore it is generally the rule rather than the exception that additional fees over the initial cap are sought.

Assuming an attorney has private work to do at his or her normal hourly rate, the more he or she works on the appointed case, the more income he or she loses. Rather than acknowledge this sacrifice and readily compensate an attorney who works long hours on an appointed case, our system is set up to make it difficult to obtain fees above the initial cap. Special approvals must be obtained to get additional fees. These approvals require appointed counsel to spend additional time on the case without it providing one iota of benefit to his or her client.

Many knowledgeable people believe issues should be addressed at the level where the issues arise. However, it appears that we are to go "all the way to the top" to get approvals for expert services. Such a system requires additional "red tape" in order to obtain decisions that should be made by trial court judges based on their superior knowledge of the needs of the individual litigant in that unique case.

These decisions should not be made in a distant place based on the ability of trial counsel to put "magic words" on bureaucratic forms. By requiring additional orders, reviews, comments, revisions, re-submission, etc., the workload of the appointed attorney is greatly increased making it more difficult to complete a proper representation within the caps allowed. Operating within that bureaucratic bungle then becomes as much of a challenge as the representation itself. This unnecessary additional burden causes appointed counsel stress and financial sacrifice but does not contribute positively to the achievement of justice.

Thank you for taking the time to review these comments which I have hastily documented.

Sincerely,

J. Al Johnson

Shelby County Government

A C Wharton, Jr.
Mayor

January 21, 2004

Janice Rawls, Chief Deputy Clerk
RE: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Dear Ms. Rawls:

In response to the Supreme Court's request for comments on the proposed amendment to Rule 13, I formulated a committee in my office to study the matter, and on behalf of the 68 attorneys in the Shelby County Public Defender's Office, I would like to submit the following comments for consideration by the Court:

Let me first say that we have studied the proposed draft submitted by the joint efforts of TBA, TACDL, and the District Public Defenders Conference, and generally speaking support their proposed new rule and the creation of the "Tennessee Indigent Representation Services" as an independent body. However, we make the following comments concerning both the Supreme Court's proposed Rule and the joint draft:

1. In § 1, 4(A) does the reference to "district public defender" include the two public defenders offices not in the District Public Defender Conference?

1. In § 1, 5(A) we believe it is important to specifically advise when a case has been "concluded." Is a writ of certiorari to the U.S. Supreme Court required?

2. In § 2, (e) we believe that "trial by jury" should be added as a factor indicating that the matter is worthy of additional compensation.

3. In § 3, (a) while we agree that it is necessary to begin preparing for a capital case at the earliest possible opportunity, as a compromise, we would suggest considering an amendment to Tenn. R. Crim. P. 12.3(b) to require notice to seek the death penalty within 30 days of arraignment in Criminal/Circuit Court.

4. In § 3, (c) we prefer to have separate qualifying conditions for "lead" and co-counsel" as suggested by the Supreme Court's proposal. However, we believe that "lead counsel" should have at least five years experience and that the

required training be conducted within a specified period of time. As for (c)(4), we believe that these skills are difficult to measure and that (c)(4)(C) is impossible to achieve without prior death penalty experience.

5. In § 5, (b) the rule should clarify "where" the motion is to be filed.

6. In § 5, (b)(3) the language requiring specific facts suggesting the investigation will result in admissible evidence is too strict.

7. In § 5, (c) "significant issue in the defense at trial" should be clarified to include the mitigation phase of a capital case.

8. In § 5, (d) we believe that there should be some mechanism for exceeding the rates specified when it is not possible to obtain an expert at the stated rate. As far as the rates, they are too low. Psychologists should be raised to $175, etc. In addition, counsel should not be required to seek the lowest bidder.

9. In § 5, (e) there should be some requirement that the Director take prompt action on the request; perhaps within a specified period of time.

Thank you for your consideration.

Sincerely,

Robert Wilson Jones

Robert Wilson Jones
Chief Shelby County Public Defender

Susan McBride
Mitigation Specialist
1619 Shelby Ave
Nashville, TN 37206

January 21, 2004

Janice Rawls, Chief Deputy Clerk
RE: Rule 13 Comments
100 Supreme Court Building
401 Seventh Avenue North
Nashville, TN 37219-1407

Re: Proposed changes to Rule 13

Dear Justices of the Supreme Court of Tennessee:

The part of the Rule 13 proposed changes that disturbs me most is the way it will impact how defense attorneys and mitigation specialists in death penalty cases approach the process of gathering sensitive information from emotionally damaged people. As difficult as this process is, my job, as is the job of any mitigation specialist, is to retrieve as much information as possible about a client's life history since the judge or jury must hear and make sense of the course of his life. This requires me to build a relationship of trust with the client as well as witnesses who can report critical events of his life. I am charged with the task of persuading the client's family and other witnesses to his life to speak with me honestly about him.

It takes many visits to gain trust and open the door to painful, shaming family secrets within a cloak of safety. One highly significant example of the sensitivity of my task involves the area of sex abuse -- which is almost a given in the lives of most of our clients and/or their family members. There is no way a stranger should approach a sexually abused person over the phone and ask them about one of the darkest times of their life no matter how much training they have. It is inappropriate and cruel. Given that we open wounds that are likely festered from years of trauma, approaching a person about this awful time in their life has to be accompanied with great care and follow up. Our gathering of information has to be done responsibly. I expect this of myself and my fellow mitigation specialists, capital defense attorneys, police officers, child welfare workers, and any others whose duties involve investigating this issue.

When appropriately trained police officers and child protection workers

investigate allegations of sexual abuse and especially when they interview victims of sexual abuse, I expect them to approach the issue with sensitivity. Otherwise, the process can trigger a traumatic reaction in a situation absent of therapeutic remedies

In my experience, appropriate investigative techniques involve several visits to those who have been abused or who bear the hallmarks of abuse[1] so that they can become comfortable with talking about an event which may be extremely traumatic and potentially humiliating[2]. Victims of sexual abuse often blame themselves for the abuse and this is one of the difficulties presenting a barrier to discovery of truthful, critical, specific information whether it is regarding the factual details of a criminal investigation of sexual abuse of the mitigation investigation of a capital defendant.

If, as is common, sexual abuse is a part of the social history of a client or his family, my next job is to document that through evidence which is admissible in court and is persuasive. This often means that I need to get corroboration of the events in question by seeking out individuals who suffered similarly at the hands of the abuser, by eliciting precise details which will accurately and completely depict the nature of the abuse, and by attempting to confirm the information with the client, who if abused himself, will create barriers as described above compounded with the stress of incarceration and a potential or pending execution.

What I fear in the proposed Rule 13 changes and what is currently happening with the denial of funding requests in capital cases is a lack of understanding of the practicalities and sensitive nature of mitigation investigation. To be as concrete as possible about the effects of this: imagine you were a mitigation investigator in a capital case and you were asked to do phone interviews of your client's sister and some initial witnesses had suggested that her father had molested her and her mother knew that this occurred. How would you

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[1]Appropriately trained mitigation specialists, as are trained child sexual abuse investigators, are aware of indications from social history, interview clues, and behavior patterns that a person may be a victim, perpetrator, or both.

[2]In using the term " humiliating", I describe the emotional perception of the person in question and not my (or a judge or jury's) perception. There is a unique aspect to sexual crimes in that victims may feel stigmatized, violated, or even guilty. Overcoming the barriers placed by these feelings is a difficult but essential task for the mitigation specialist.

speak with her on the telephone and expect her to react? What if you were allowed to travel to see her in person only one time? Would you expect her to open up and tell you everything the first time you met her? Eliciting these tough, frightening, horrible details and images – which no one wants to talk about it, would rather have buried, which in their mind are painful, embarrassing, or for some even damning – are the routine responsibility of mitigation specialists.

There are a lot of other things mitigation specialists do but since the task of documenting human tragedy is the part that is most crucial, I would like the Court to consider how the proposed rule changes and current AOC practice can harm not only the work of mitigation specialists in Tennessee, but also the real people involved in these cases.

Please reconsider the notion of shortchanging the already victimized people I meet by requiring me to treat them with any less regard than a trained investigator working for the prosecution arm of the state would.

Sincerely,

Susan McBride

Susan McBride